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No. 84-631.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

JEANETTE ATTERBERRY,
PETITIONER,

v.

JOSEPH M. JORDAN, AS HE IS
POLICE COMMISSIONER OF THE CITY OF BOSTON,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Respondent's Brief in Opposition.

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Respondent's Brief in Opposition.

The respondent respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts in this case.

Statement of the Case.

Prior Proceedings.

The respondent adopts the statement of prior proceedings contained in the decision of the Massachusetts Supreme Judicial Court. Petition for Certiorari (hereinafter "P.") at 2a-3a.

On July 19, 1984, the Supreme Judicial Court issued its decision, affirming the judgment of the Massachusetts Superior Court (P. 1a-9a). Thereafter, the petitioner filed a petition for a writ of certiorari with this Court.

Statement of the Facts.

The petitioner is a police officer employed by the Boston Police Department. On July 8, 1981 petitioner, while on duty, was involved in an automobile collision as a result of which she sustained a fractured pelvis, fractured ribs and a severe mace burn. Since July 8, 1981 to the present, petitioner has been carried injured on duty without loss of pay pursuant to Massachusetts General Laws c. 41, § 111F (P. 3a).

Rule 110, § 22D of the Rules and Regulations of the Boston Police Department provides in part that "[t]he Police Commissioner may not allow pay from accumulated sick credit or for injury on duty status if the reported sickness or injury proves to be feigned, simulated or exaggerated, or: . . . D. If the officer shall fail to remain at his residence unless permitted by the Police Commissioner to go elsewhere" (P. 22a).

On January 5, 1983 the Commissioner promulgated Special Order 83-1 which set out administrative procedures to ensure compliance with Rule 110, § 22D and to also provide an equitable method for police officers to obtain permission to leave their residences for valid purposes (P. 23a-25a).

At the hearing on the merits, the parties submitted the case to the Superior Court on the pleadings and a stipulation that "[t]here are presently 1,778 total sworn members of the Boston Police Department, of which 1,548 are patrol officers and detectives. . . . On January 5, 1983 Department records show a total of 184 sworn members of the Department were on sick or injured status, of which 169 were patrol officers or detectives. Of the total figures of 184, 117 had been on sick or injured status over 30 days, of which 109 are patrol officers or detectives. . . . Boston Police Department Rule 110 and Special Order 83-1 have been submitted to the Court as exhibits" (P. 3a).

On numerous occasions prior to January 5, 1983 the petitioner sought permission to leave her residence, which was sometimes granted and at other times denied (P. 3a). The petitioner, at the time of the trial of this case, was one of 109 patrol officers or detectives out of a force of 1,548 who were on sick or injured status for more than 30 days (P. 6a).

Reasons for Denying the Writ.

I. The Question Presented for Review by Petitioner Misstates the Holding of the Massachusetts Supreme Judicial Court.

Petitioner has phrased the question presented for review herein as a constitutional challenge to a rule and special order of the Boston Police Department "which require Boston Police officers on injured-on-duty leave to remain at their residences at all times unless permitted by the Police Commissioner to go elsewhere".

Respondent submits that this is not the issue either decided by the Massachusetts Supreme Judicial Court or an accurate

summary of the provisions of Boston Police Department Rule 110, § 22D and Special Order 83-1 (see P. 22a-25a).

The police department's rule and order do not totally prohibit police offficers from leaving their residences while on injured-on-duty status. The rule and order merely require officers on leave because of illness or injury to notify the department before leaving their homes for certain specified purposes and to obtain permission from their commanding officers before leaving their homes for any other reason. Nothing in the rule or order prohibits police officers from leaving their residences at any time for any particular purpose so long as prior approval has been obtained from their commanding officer.

The instant case was presented to and decided by the Massachusetts Supreme Judicial Court on this basis. The Court carefully emphasized that it was deciding only the facial constitutionality of the rule and order that requires police officers on leave because of illness or injury to notify the department before leaving their homes for certain specified purposes and to obtain permission from the department before leaving their homes for any other reason. *Atterberry* v. *Police Commissioner of Boston*, 392 Mass. 550, 556-557 (1984). The Court did not decide the constitutionality of a rule that places a total prohibition on leaving the home or a rule that sets no standards for deciding whether permission should be granted or denied.

II. The Massachusetts Supreme Judicial Court Followed Established Supreme Court Precedent in Holding That Where a Police Department Places Restrictions on the Activities of Its Employees, a Rational Basis Provides the Appropriate Standard of Review.

The United States Supreme Court has held that government agencies have legitimate interests as employers in restricting

the activities of their employees that differ significantly from those possessed in connection with regulation of the general populace. *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). For example, the Court has sustained comprehensive and substantive restrictions upon First Amendment Rights of both federal and state employees. *United States Civil Service Com.* v. *Letter Carriers*, 413 U.S. 548, 556 (1973). *Broadrick* v. *Oklahoma*, 413 U.S. 601, 618 (1973).

In this light, the Court in *Kelley* v. *Johnson*, 425 U.S. 238, 245 (1976), recognized that a police department may place significant restrictions on its members so long as there exists a rational connection between the regulation and the advancement of the efficient operation of the law enforcement agency. Thus, the focus in this case is whether the Police Commissioner can demonstrate a rational relationship between Rule 110, § 22D of the Rules and Regulations of the Boston Police Department and the promotion of an efficient police force. *Kelley*, 425 U.S. at 247.

This Court has recognized that a municipality's choice of organization, regulation and control of its police force should be accorded great deference. *Id.* at 245; *Rizzo* v. *Goode*, 423 U.S. 362, 378, 379 (1976). Massachusetts statutes provide that the city of Boston Police Department be under the command of an experienced law enforcement officer who has broad authority over the operation and administration of the department including the authority to promulgate all needful rules and regulations for the efficiency of the force. The statutes also provide that members of the department are subject to department rules and regulations whether on or off duty. Massachusetts Acts of 1906, c. 291, §§ 7, 11, as amended by Acts of 1962, c. 322, § 1.

The rational relationship analysis has been applied to a case identical to the instant case. *Loughran* v. *Codd*, 432 F. Supp.

259 (E.D. N.Y. 1976). The court, citing *Kelley*, noted that "Loughran seeks the court's protection not as an ordinary citizen, but as an employee of the New York City Police Department". *Id.* at 263. Similarly, plaintiff here seeks a declaration of her rights as a Boston Police Officer. Recognizing that government agencies have been granted the widest latitude in the dispatch of their own affairs, *Rizzo* v. *Goode*, 423 U.S. at 362, the court held that the compelling state interest test which would be appropriate in the context of a civilian complaint, should play no part where the challenge is by a city employee and is directed at an agency's internal policy. *Loughran* v. *Codd*, 432 F. Supp. at 263. Therefore, the proper standard of review in the present case, keeping in mind the Supreme Court's warnings against judicial intervention into administrative functions, is whether the promulgation enacted is so irrational that it may be branded arbitrary, and therefore, a deprivation of plaintiff's constitutional rights. *Loughran* v. *Codd*, 432 F. Supp. at 263; *Kelley* v. *Johnson*, 425 U.S. at 248.

III. Rule 110, § 22D of the Rules and Regulations of the Boston Police Department Is Rationally Related to the Promotion of an Efficient Law Enforcement Agency.

A. *Police Regulations Similar to Rule 110, § 22D have Previously Withstood Constitutional Challenges Identical to Those Presented by Petitioner.*

Respondent submits that it provides liberal benefits to its police officers suffering from injury or sickness. See M.G.L. c. 41, § 111F. Petitioner has suffered no loss of pay since the date of her original injury, July 8, 1981, and, she continues to receive her full salary. In an effort to limit the potentialities

for abuse, respondent has promulgated Rule 110, § 22D. The regulation attempts to "track the individual rehabilitative progress of the disabled member and to foster his expeditious return to duty". *Loughran* v. *Codd*, 432 F. Supp. at 264.

The *Loughran* court recognized the legitimate need for a police department to control abuses of sick and injury leave. *Id.* at 263. At the time of trial, there were 117 Boston Police Officers who had been on injured status or sick leave more than thirty days and 67 other officers who had been injured or sick for less than thirty days. These figures represent a significant percentage of the total working force and present a serious reduction in manpower. Consequently, the public and the police department experience shortages in police protection while these officers recuperate. It is in the public's best interest that the Police Commissioner minimize unnecessary absences from duty. The promotion of public safety is "unquestionably at the core of the State's police power". *Kelley* v. *Johnson*, 425 U.S. at 247.

Rule 110, § 22D, like the New York City Police regulation in *Loughran*, requires that officers call the department when they need to leave their residences. Such a regulation does not place an unconstitutional burden on petitioner. *Id.* at 265. Rather, it provides for a rational method for the respondent to insure that officers receiving compensation for injuries are not undertaking tasks which may hinder their rehabilitation. The instant case and *Loughran* illustrate the need to supervise officers' rehabilitation. In *Loughran*, the officer was found to be coaching the Police Department's football team while on injured leave. *Id.* at 266. Petitioner here has been receiving full pay while injured since July 8, 1981.

In addition, the respondent has promulgated Special Order No. 83-1 which more efficiently implements Rule 110, § 22D. This order permits officers out injured or sick to simply contact

the Police Department's Operations Division to receive permission to leave their residence for certain specific purposes.

Respondent submits that Rule 110, § 22D clearly provides a rational connection to the respondent's legitimate attempt to curtail abuses of injured on-duty compensation and to provide a more efficient police force serving the needs of the citizens of Boston. For this Court to rule otherwise would cripple all attempts by government agencies at all levels to efficiently administer their internal affairs and would be contrary to controlling precedent.

B. *The Instant Case is Factually Distinguishable from* Pienta v. Schaumburg, *and Its Holding Resulted from an Erroneous Application of Law.*

Petitioner almost entirely relies on a recent federal case that reaches a decision contrary to the instant case and controlling precedent. *Pienta* v. *Schaumburg*, 710 F.2d 1258 (7th Cir. 1983). *Pienta* involved a constitutional attack on a police department regulation relative to injured status or sick leave. *Id.* at 1259. Unlike respondent's Rule 110, § 22D and Special Order 83-1, the Schaumburg Police Department had promulgated a regulation which denied officers the privilege of leaving their residence for all but medical reasons. *Id.* at 1259, 1260. The Schaumburg regulation effectively foreclosed officers' right to vote, right to free exercise of religion, and the right to travel.

Clearly such restrictions are much harsher than the rules and procedures established by the respondent Police Commissioner. Special Order 83-1 specifically sets forth permissible requests for leaving one's residence while on injured or sick leave which include attending church services, caring for minor children, and voting. The order also provides a method for officers to seek permission to leave their residence for other reasons.

In addition to the gross dissimilarities between the *Schaumburg* regulation and respondent's rule and order, the court in *Pienta* applied an incorrect standard of review. The court held that it should employ a compelling interest test when determining the validity of a police department's internal regulations when the employees' constitutional rights are involved. *Id.* at 1260. Such an interpretation ignores the Supreme Court opinions in *Kelley* and *Rizzo*.

As the *Loughran* court correctly stated, only when the restriction serves to penalize the practice of a constitutional freedom must the state proffer a compelling reason in order to justify the infringement. *Loughran* v. *Codd*, 432 F. Supp. at 263. Clearly providing benefits to police officers who are disabled cannot be considered a penalty merely because the employer places restrictions on their activities.

Concededly, *Schaumburg's* regulation was greatly restrictive. However, the proper standard of review was a rational connection test as employed in *Kelley*. Thus, not only is the present case factually different but also the application of law in *Pienta* was erroneous and should not be followed.

C. *Rule 110, § 22D of the Rules and Regulations of the Boston Police Department is Valid Notwithstanding that it Regulates the Activities of Officers During Off-Duty Hours.*

Respondent submits that he has the power and legitimate need to regulate the activities of officers who are out injured or sick during what would be off-duty hours. *See Broderick* v. *Police Commissioner of Boston*, 368 Mass. 33, 41 (1975), cert. denied sub nom. *Broderick* v. *diGrazia*, 423 U.S. 1048 (1976). (Commissioner may make inquiry into the activities of police officers during off-duty hours.) In an effort to foster the expeditious return of disabled officers, it is necessary to en-

sure that the officers are acting in a manner which would facilitate rehabilitation. Therefore, any attack on Rule 110, § 22D based upon the regulation of non-duty hous is foreclosed by *Broderick* and the Police Commissioner's authority to promulgate regulations which officers must obey both on and off duty. See Massachusetts Acts of 1906, c. 291 as amended by Acts of 1962, c. 322.

Conclusion.

For the foregoing reasons the respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Statutory Appendix.

MASSACHUSETTS ACTS OF 1906, c. 291, §§ 7, 11, AS AMENDED BY MASSACHUSETTS ACTS OF 1962, c. 322, § 1.

Section 7. There shall be in the city of Boston a department, known as the police department, which shall be under the charge of an officer, known as the police commissioner, appointed by the mayor for a term of five years commencing on May first of the year in which he is appointed, except that any vacancy in said office shall be filled for the balance of the unexpired term. Such officer shall at the time of his appointment have had at least ten years' experience as a member of a federal, state or local police force or law enforcement agency. Notwithstanding the provisions of section fourteen of chapter four hundred and eighty-six of the acts of nineteen hundred and nine such officer may, after notice and hearing, be removed by the mayor of said city for cause. Such officer shall not engage in any other business, and shall receive an annual salary of fifteen thousand dollars or such other sum as may from time to time be fixed by the city council with the approval of the mayor.

. . . . . .

Section 11. The police commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department and shall make all needful rules and regulations for the efficiency of said police; provided, however, that no such rule or regulation shall forbid any officer or member of said police from organizing or belonging to any organization composed solely of officers or members, or both, of said police and not affiliated with any outside organization other than the Massachusetts Police Association, and having among its objects

the improvement of their conditions of employment, including leaves of absence, hours of labor and compensation. Officers and members of said police shall, whether on or off duty, be subject to the rules and regulations made under this section.

Any officer or member of said police shall have the right to petition the general court or the city council of said city and to appear before any committee thereof; provided, that this paragraph shall not authorize any officer or member to absent himself from duty without permission.